STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TAFT PARTNERS DEVELOPMENT GROUP	:	DETERMINATION DTA NO. 817465
for Revision of a Determination or for Refund of Tax on Gains Derived from Real Property Transfers under Article 31-B of the Tax Law.	:	

Petitioner, Taft Partners Development Group, c/o Goodstein Development Corporation, 242 East 51st Street, New York, New York 10022, filed a petition for revision of a determination or for refund of tax on gains derived from real property transfers under Article 31-B of the Tax Law.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on January 17, 2001 at 9:15 A.M., with all briefs to be submitted by May 11, 2001, which date began the six-month period for the issuance of this determination. Petitioner appeared by Kaye, Scholer, Fierman, Hays & Handler, LLP (Louis Tuchman and Daniel Besser, Esqs. of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Kevin R. Law, Esq., of counsel).

ISSUES

I. Whether the stipulation of settlement entered into by the representatives of Sholom Drizin and the Attorney General's Office included the notice of determination issued to Taft Partners Development Group relating to the same transfer.

II. Whether the General Obligations Law is applicable to the stipulation of settlement such that it disposes of the notice of determination to Taft Partners Development Group.

III. Whether petitioner is the transferee in the partnership transfer.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued a Notice of Determination, dated April 30, 1992, to Sholom Drizin asserting real property transfer gains tax due of $643,309.00, plus interest of $804,228.86 and penalties of $225,158.00, for a total amount due of $1,672,695.86. The "Computation Section" of the notice contained the following explanation:

> Section 1447.3 of Article 31B of the tax law states in part "...in a case where no tentative assessment has been issued because the transferee did not file the required questionnaire... the transferee shall be personally liable for the taxes stated to be due in a Notice of Determination... and such liability may be assessed and enforced in the same manner as the liability for the tax under this Article..."

The notice went on to state that a search of the Division's files failed to find a filing on the transfer of a controlling interest of Taft Partners Development Group from Mr. Drizin to petitioner and that as such filing was required, the tax has been computed as shown.

2. On January 5, 1984, Royale Towers Associates ("seller") and Sholom Drizin ("purchaser") entered into an Amended and Restated Agreement For Sale and Purchase of the Taft Hotel. According to this purchase and sale agreement, the purchase price was to be $32,505,280.00. The terms also provided that contemporaneously with the execution and

delivery of the contract the purchaser was to deposit $3,200,000.00 with the seller. The property known as the Taft Hotel is located at 761-779 Seventh Avenue, New York, New York.

3. On March 1, 1984, Mr. Drizin entered into an Agreement of Assignment ("assignment"), wherein Mr. Drizin was the assignor and Arthur Cohen, Steven Goodstein, Martin Goodstein and Jacob Sopher were collectively listed as the assignee, "having a place of business c/o Goodstein Management, Inc., 211 East 46th Street, New York, New York."

According to the terms of this assignment, Mr. Drizin assigned a 50% interest in the agreement for sale and purchase of the premises located at 761-779 Seventh Avenue, New York, New York, dated January 5, 1984, which he had with Royale Towers Associates to the assignee in return for assignee's payment to him of $1,600,000.00. In addition, pursuant to paragraph 4(a) of this assignment, Mr. Drizin and the assignee were to enter into a limited partnership agreement and the partnership was to acquire title to the premises.

4. On March 7, 1984, Mr. Drizin entered into an Agreement of Limited Partnership of Taft Partners Development Group ("agreement").

Pursuant to the agreement: (a) Arthur Cohen, Steven Goodstein, Martin Goodstein and Jacob Sopher were, collectively, the managing general partners; (b) Mr. Drizin, Arthur Cohen, Steven Goodstein, Martin Goodstein and Jacob Sopher were general partners; and (c) Andrew Goodstein, Martin Goodstein, Patricia Kay Goodstein and Mitchell Siegel, as trustees f/b/o Michele A. Goodstein u/t/a dated July 7, 1967, f/b/o Geoffrey A. Goodstein u/t/a dated July 7, 1967, and f/b/o Shari L. Goodstein u/t/a dated July 7, 1967, and Samuel Lewis were limited partners. Trustees Martin Goodstein, Patricia Kay Goodstein and Mitchell Siegel were listed in the agreement "with an address c/o Goodstein Management, Inc., 211 East 46th Street, New York, New York."

The general partners held the following percentage interests in the partnership: Mr. Drizin - 50%; Arthur Cohen - 20%; Steven Goodstein - 8.5%; Martin Goodstein - 2%; and Jacob Sopher - 10%. The remaining 9.5% interest was held by the limited partners.

5. On March 7, 1984, Mr. Drizin ("seller") and Steven Goodstein ("purchaser") entered into a Partnership Interest Acquisition Agreement ("acquisition agreement") whereby Mr. Drizin sold to Steven Goodstein a 35% interest in Taft Partners Development Group for $8,320,000.00. Upon consummation of the sale of Mr. Drizin's 35% interest, his remaining 15% interest in petitioner automatically converted to a limited partner's interest.

6. According to the terms of the acquisition agreement, Mr. Drizin, simultaneously with the receipt of a $1,600,000.00 down payment and a Letter of Credit in the amount of $6,720,000.00, was to execute and deliver to Steven Goodstein an instrument "for the purpose of assigning the Interest to Purchaser or his assignee(s) or designee(s)." In addition, Mr. Drizin was to execute any documents or certificates required "in connection with the transfer of the Interest and the conversion of Seller's remaining interest in the Partnership to a limited partner's interest."

Pursuant to paragraph 6, the agreement was:

> conditioned upon Purchaser obtaining and delivering to Seller the Letter of Credit, prior to or simultaneously with the downpayment on a date not later than the date the Partnership acquires title to the Premises.

This paragraph also provided that, in the event that the Letter of Credit was not obtained and delivered to the seller or if it did not comply with the requirements contained in paragraph 5, the transaction would be null and void and "neither party shall have any claim against the other." Paragraph 7 of the acquisition agreement contained the "Conditions Precedent" to the consummation of the sale of the interest, which included, *inter alia*, that the March 1, 1984

assignment between petitioner, Steven Goodstein, Martin Goodstein, Arthur Cohen and Jacob Sopher “shall not have been rescinded.”

The agreement also specifically provided that Mr. Drizin was responsible for making the requisite real property transfer gains tax (hereinafter "gains tax") filings and paying the tax which "*may*" be due, regardless of whether the State made a claim for said taxes at closing or at any future time.

7. Mr. Drizin executed as a partner of petitioner a Real Property Transfer Gains Tax Questionnaire -Transferee, Form TP-581 ("transferee questionnaire"). According to the questionnaire, petitioner was the transferee which was acquiring a 100% fee interest in 761-779 Seventh Avenue, New York, New York, Section 4, Block 1003, Lot 1 on May 15, 1984 for $32,280,000.00 from transferor, Royale Tower Associates.

8. On June 11, 1984, Chase Manhattan Bank ("Chase") sent a loan commitment letter for the purchase and renovation of the fee premises located at 777 Seventh Avenue, New York, New York to the Goodstein Construction Company. The loan commitment letter was addressed to "The Goodstein Construction Company, 211 East 46th Street, New York, New York, Attention: Mr. Martin Goodstein."

Included as part of the terms in Chase's loan commitment letter were the following:

> We agree to lend $102,000,000 to a partnership comprised of Martin and Steven Goodstein, Arthur Cohen and Henry Sopher (hereinafter and in the General Conditions attached hereto termed the 'Borrower') of which up to $41,000,000 shall be advanced for acquisition of the Premises (the 'Acquisition Allocation'), with the balance (the 'Construction Allocation') to be advanced for the renovation of the existing building located on the Premises into a multi-use condominium building containing 20,470 square feet of professional space, 23,493 square feet of retail space, 24,470 square feet below grade, including a 4,996 square foot health club and residential space containing 720 condominium apartments aggregating 343,207 saleable square feet of space, all of which shall be completed within 24 months from the date of the loan closing.

Additionally, Chase required that a guaranty of payment of the note be executed by Martin and Steven Goodstein, Arthur G. Cohen and Henry Sopher.

9. Following the acquisition of the Taft Hotel on September 24, 1984, petitioner developed the property and converted it to condominium status. In connection with this development, petitioner filed transferor questionnaires, reporting its gain in connection with the disposition of condominium units in accordance with the regulations established by the Division requiring periodic updates of estimates of consideration and of costs. In these returns petitioner, as transferee, sought to claim the cost of the acquisition of the 35% interest as part of its original purchase price. During the audit of these returns, the Division discovered the unreported transfer and issued the notice of determination to Mr. Drizin described in Finding of Fact "1".

10. Sholom Drizin petitioned the assessment and a formal hearing was held. Based on additional information supplied to the Division, the tax due on the transfer was reduced to $623,541.00, plus penalty and interest. In a determination dated December 30, 1995, the Administrative Law Judge concluded that the 35% acquisition was not subject to the Real Property Transfer Gains Tax. Following an exception, the Tax Appeals Tribunal, in a decision dated May 15, 1997, reversed the determination of the ALJ and sustained the modified notice of determination issued to Mr. Drizin. Mr. Drizin then commenced an Article 78 proceeding in the Appellate Division, Third Department. As Mr. Drizin had failed to pay the amount due or file a bond, Assistant Attorney General Julie Mereson made a motion to dismiss the proceeding, which was granted.

11. Following the dismissal of the Article 78 proceeding, settlement discussions began between Ms. Mereson and representatives of Mr. Drizin: Jeremy Heisler, David Eisig, Judge Fusco and David Jaroslawicz. The only matter discussed during these negotiations was the

assessment issued to Mr. Drizin, assessment number L-005583137. During the negotiations, Ms. Mereson referred to a computation of tax, penalty and interest due which indicated a balance due of $980,010.00, including the application of the refund which is at issue in this matter. The representatives of Mr. Drizin drafted a stipulation of settlement which Ms. Mereson reviewed, made some changes to and then executed along with David Jaroslawicz. The stipulation provides as follows:

> RE: MATTER OF SHOLOM DRIZIN DTA NO. 811808
>
> IT IS HEREBY STIPULATED BY AND AGREED, by and between the taxpayer, Sholom Drizin, and the State of New York Department of Taxation and Finance, that the above matter and claim of the Department of Taxation and Finance for taxes, penalties and interest under assessment number L-005582137 is settled against Sholom Drizin for the amount of Eight Hundred Fifty Thousand ($850,000.00) Dollars, to be paid by check drawn on a New York bank on or before July 31, 1998.
>
> IT IS FURTHER AGREED, that all appeals and proceedings will be withdrawn as part of the settlement.

The stipulation is dated July 7, 1998.

12. During 1991 petitioner filed a Claim for Refund of Real Property Transfer Gains Tax in the amount of $533,273.51. The refund claim is based upon gains tax paid as part of the Taft Hotel project. Following an audit by the Division, the amount of the refund was reduced to $529,873.00.

13. On July 31, 1995, the Division issued to petitioner a Notice of Determination under Gains Tax Law, number GT-95073101, which indicated that petitioner was liable as a transferee for its purchase of the 35% partnership interest from Sholom Drizin. The notice provided that petitioner was being assessed tax due of $623,541.00, plus penalty and interest, and also indicated that overpayment relating to the condominium development in the amount of $529,873.00 had been applied to the amount due.

CONCLUSIONS OF LAW

A. Petitioner's argument that the stipulation of settlement between Sholom Drizin and the Attorney General's Office also resolved the dispute between petitioner and the Division is without merit. The stipulation references DTA No. 811808 and Notice of Determination number L-005583137, both numbers being unique to Mr. Drizin and the assessment issued to him as transferor. Nowhere in the stipulation is mentioned the DTA No. (817465) or the notice of determination number (GT-905073101) that were applicable to petitioner and which represent petitioner's liability as transferee. The stipulation of settlement is between Mr. Sholom and the Department of Taxation and Finance, and states that the assessment issued to Mr. Sholom is settled, mentioning no other parties, DTA numbers or assessments.

In ***Dansker v. NYS Department of Taxation***, (Sup Ct, Albany County, December 1, 2000, Lamont, J., index No. 5319-00,), a party to a stipulation of settlement tried to read additional terms into the stipulation. The taxpayer claimed that the stipulation should be read so as to include other persons responsible for the tax due in the same reduced amount that formed the basis of his settlement. In refusing to do so, the court stated that: "This Court will not expand the effect of a stipulation entered into by the petitioner and the State after extended negotiations beyond the express and explicit terms thereof." The court went on to state that: "If the intention of the petitioner was to settle any potential tax liabilities [of others], the petitioner should not have entered into the stipulation until that language was included in the stipulation - after extended negotiations while represented by legal counsel." (***See also***, ***Kroh v. Commissioner***, 98 TC 383).

The Drizin stipulation was entered into after negotiations between the Attorney General's Office and the four representatives of Mr. Drizin. The stipulation of settlement was drafted by

petitioner's representatives. There was ample opportunity to shape the stipulation to include the notice of determination issued to petitioner. This was clearly not done. A stipulation of settlement is a contract between the parties and is governed by contract law (***See***, ***Dorchester Industries, Inc. v. Commissioner***, 108 TC 320). As such, it must be first be determined that a contract is ambiguous before resort to parol evidence is permissible in an attempt to determine the intent of the parties to the settlement. In the present matter, the Drizin stipulation is clearly unambiguous, and since there is no allegation of fraud, accident or mistake, the parol evidence rule prohibits resort to extrinsic evidence to alter or explain the meaning of a contract when the language of the contract is clear on its face (***Matter of Emery Air Freight Corporation v. New York State Tax Appeals Tribunal***, 188 AD2d 772, 591 NYS2d 264). In view of the fact that the terms contained in the stipulation of discontinuance are unambiguous as to the settlement arrangement, it is proper to exclude from consideration in reaching this determination the oral testimony presented by petitioner which is at variance with the language contained in the stipulation (***see***, ***Braten v. Bankers Trust Co.***, 60 NY2d 155, 468 NYS2d 861).

B. Petitioner contends that the Stipulation, together with General Obligations Law § 15-105(1), disposes of petitioner's liability with respect to the partnership transfer. General Obligations Law § 15-105(1) provides as follows:

> If an obligee releasing or discharging an obligor without express reservation of rights against a co-obligor, then knows or has reason to know that the obligor released or discharged did not pay so much of the claim as he was bound by his contract or relation with that co-obligor to pay, the obligee's claim against that co-obligor shall be satisfied to the amount which the obligee knew or had reason to know that the released or discharged obligor was bound to such co-obligor to pay.

Tax Law former § 1442(a) provided that the Real Property Transfer Gains Tax was to be paid by the person liable for the tax. The person liable for the tax, according to Tax Law former

§ 1440(9), was the person personally liable for the tax as either a transferor or a transferee pursuant to Tax Law former § 1447(3)(a). Tax Law former § 1447(3)(a) imposed personal liability on the transferee when the transferee failed to file the required questionnaire, as follows:

> For the transferee's failure to comply with the provisions of this subdivision, the transferee . . . shall be personally liable for the payment to the state of any such taxes stated in such tentative assessment to be due to the state from the transferor; provided, however, in a case where no tentative assessment has been issued because the transferee did not file the required questionnaire, . . . , the transferee shall be personally liable for the taxes stated to be due in a notice of determination, except that the liability of the transferee shall be further limited to the sums of money, property or other consideration which the transferee is required to transfer over to the transferor, and such liability may be assessed and enforced in the same manner as the liability for tax under this article. . . .

It is clear under the statute that upon the failure to file the required transferee questionnaire, petitioner became personally liable for the tax due as a result of the partnership transfer, and thus petitioner's liability is joint and several with that of the transferor (***see***, ***Heller v. State of New York***, 81 NY2d 60, 595 NYS2d 731). The statute also provides that the transferee's liability is to be enforced in the same manner as the liability for any other real property transfer gains tax under Article 31-B. The purpose of the imposition by Tax Law former § 1447(3)(a) of personal liability upon the transferee was to provide the State with an alternative means to ensure, to the extent possible, that real property transfer gains taxes determined to be due are paid over to the State. The Division may collect any amount due from either the transferor or transferee up to the total amount due (***see***, ***Matter of Phillips,*** Tax Appeals Tribunal, May 11, 1995). The Division initially collected from petitioner the refund due on the Taft Hotel condominium project. It then settled the remaining amount due with the transferor, properly reducing the amount owed by the transferor with the amount of petitioner's refund, so as not to double collect. At this point in the process, the real property transfer gains tax owed on the partnership transfer had been paid in

full. Interpreting the General Obligations Law to require the State to refund the amount claimed by petitioner would be to deny the Division full payment of the tax due, to which it is entitled under the former Article 31-B. It would also be a construction contrary to public interest, which should be avoided (***Alro Liquors, Inc. v. New York State Liquor Authority***, 29 AD2d 271, 288 NYS2d 179). If petitioner is entitled to restitution for the gains tax paid, it should look to its contract with the transferor, not the state, which pursuant to Tax Law former § 1447(3)(a), is entitled to collect in full from either the transferor or transferee, or some combination of the two.

C. Petitioner alleges for the first time in its brief that it was not the transferee in the partnership transfer. The Division did not have the opportunity to factually develop this issue at the hearing, and would therefore be prejudiced if such issue was addressed in this determination.

D. The petition of Taft Partners Development Group is denied, and the denial of petitioner's refund claim by the Division of Taxation is sustained.

DATED: Troy, New York
November 8, 2001

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE